No. 91-859

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In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,
PETITIONERS

v.

STATE OF MONTANA, ET AL.

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Article I, Section 2, Clause 3 of the United States Constitution provides that Representatives in the United States House of Representatives "shall be apportioned among the several States which may be included within this Union, according to their respective Numbers." Section 2 of the Fourteenth Amendment reiterates that requirement. The questions presented by this case are:

1. Whether Congress's choice among alternative means of apportioning Representatives that are rationally tied to the respective populations of the States is subject to review by a court.

2. Whether 2 U.S.C. 2a, which provides for apportionment of Representatives on the basis of the mathematical formula known as the "method of equal proportions," satisfies the requirement that Representatives be apportioned among the States "according to their respective Numbers."

PARTIES TO THE PROCEEDINGS

The petitioners here, who were defendants in the district court, are the United States Department of Commerce; Robert A. Mosbacher, Secretary of Commerce; the Bureau of the Census; and Barbara Everitt Bryant, Director of the Bureau of the Census. Donnald K. Anderson, Clerk of the United States House of Representatives, also was a defendant in the district court and has filed a separate notice of appeal to the court of appeals.

The respondents in this Court, who were the plaintiffs in the district court, are the State of Montana; Stan Stephens, Governor of Montana; Marc Racicot, Attorney General of Montana; Mike Cooney, Secretary of State of Montana; Max Baucus and Conrad Burns, United States Senators from Montana; and Pat Williams and Ron Marlenee, United States Representatives from Montana.

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The Solicitor General, on behalf of the United States Department of Commerce, the Secretary of Commerce, the Bureau of the Census, and the Director of the Bureau of the Census, respectfully petitions for a writ of certiorari before judgment to the United States Court of Appeals for the Ninth Circuit in this case. This petition seeks review of the judgment of the United States District Court for the District of Montana, which was entered by a three-judge court. The petition is filed on a protective basis, and the Solicitor General requests that it be granted if the Court concludes that it does not have jurisdiction over the direct appeal that petitioners have taken pursuant to 28 U.S.C. 1253 from the same judgment of the district court.

OPINIONS BELOW

The opinion of the three-judge district court (J.S. App. 1a-34a),[1] and the order of the single judge (J.S. App. 35a-46a) are not yet reported.

JURISDICTION

The judgment of the district court (J.S. App. 47a-48a) was entered on October 18, 1991. The protective notice of appeal to the court of appeals (J.S. App. 52a-53a) was filed on October 24, 1991, and the appeal was docketed in that court on November 20, 1991. The jurisdiction of this Court is invoked, on a protective basis, under 28 U.S.C. 1254(1). See pages 7-10, *infra*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 2, Clauses 1 through 3, and Section 8, Clause 18 of the United States Constitution; Sections 2 and 5 of the Fourteenth Amendment to the Constitution; 2 U.S.C. 2a; 13 U.S.C. 141(a) and (b); and 28 U.S.C. 1253 and 2284(a) are reproduced at J.S. App. 54a-59a.

STATEMENT

The district court in this case held unconstitutional the Act of Congress that prescribes the method for apportioning Representatives among the States. 2 U.S.C. 2a(a). The statute, enacted in 1941, mandates that Representatives be apportioned by what is known as the "method of equal proportions." That method,

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[1] "J.S. App." refers to the appendix to the jurisdictional statement that we are filing, simultaneously with this certiorari petition, to docket the direct appeal from the judgment of the district court.

and the four alternatives considered at the time (including the "Adams method" and "Dean method" advocated by respondents in the district court), are described in some detail at pages 4-11 of the jurisdictional statement that we are filing simultaneously with this certiorari petition.

1. Article I of the Constitution provides that "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers," "but each State shall have at Least one Representative" and the total "Number of Representatives shall not exceed one for every thirty Thousand" persons. Art. I, § 2, Cl. 3. The "actual Enumeration" of persons must be made every ten years, "in such Manner as they [the Congress] shall by Law direct." *Ibid.* Section 2 of the Fourteenth Amendment reiterates that "Representatives shall be apportioned among the several States according to their respective numbers."

Congress has directed the Secretary of Commerce to conduct a census, as of April 1 of 1980 and every tenth year thereafter, "in such form and content as he may determine." 13 U.S.C. 141(a). The tabulation required for apportionment "shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States." 13 U.S.C. 141(b). The President, in turn, must transmit to Congress, during the first week of its next Session, "a statement showing the whole number of persons in each State," as ascertained by the census. 2 U.S.C. 2a(a). The President's statement must also show "the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Represen-

tatives by the method known as the method of equal proportions, no State to receive less than one Member." *Ibid.* The apportionment statute further provides that "[e]ach State shall be entitled * * * to the number of Representatives shown in the [President's] statement required by [2 U.S.C. 2a(a)]," and it directs the Clerk of the House of Representatives, within 15 days after receipt of the statement, to "send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section." 2 U.S.C. 2a(b).

2. Following the 1990 census, the President, on January 3, 1991, transmitted to Congress the statement required by 2 U.S.C. 2a(a). Under the method of equal proportions, Montana was entitled to one Representative, a loss of one.

On May 22, 1991, respondents (the State of Montana and its Governor, Attorney General, Secretary of State, Senators, and Representatives) commenced this suit for declaratory and injunctive relief against the Department and Secretary of Commerce, the Bureau of the Census and its Director, and the Clerk of the House of Representatives. Respondents alleged that use of the equal proportions method to apportion Representatives contravenes Article I, Section 2 of the Constitution, and they urged adoption of the harmonic means (Dean) method or the smallest divisors (Adams) method (see J.S. 6 n.6, 7-9), neither of which had ever been previously utilized. Under the Dean method, Montana would receive two Representatives rather than one, while Washington would receive eight rather than nine; no other State's allocation would be affected. The Adams method, however, would alter the allocations to 18 States. J.S. 11-12.

3. On October 18, 1991, a divided three-judge district court declared 2 U.S.C. 2a "unconstitutional and

void" and permanently enjoined the defendants "and their agents * * * from effecting reapportionment of the United States House of Representatives under [2 U.S.C. 2a]." J.S. App. 48a; *id.* at 1a-34a.[2]

a. The court recognized that strict application of the "one person, one vote" principle is a "mathematical impossibility" in this setting, "because Congress must adhere to existing state boundaries and each state must have at least one representative." J.S. App. 9a. But the court concluded that that principle nevertheless should govern to the extent practicable, and that the reasoning of *Wesberry* v. *Sanders*, 376 U.S. 1 (1964), and *Karcher* v. *Daggett*, 462 U.S. 725 (1983)—which concerned a state legislature's drawing of congressional districts within a State—should also apply to Congress's apportionment of Representatives among the States. J.S. App. 9a-12a. In the court's view, if the party challenging such an apportionment "establishes 'that the population differences were not the result of a good-faith effort to achieve equality,' the burden then shifts to the defendant to prove 'that each significant variance between districts was necessary to achieve some legitimate goal.' " *Id.* at 13a (quoting *Karcher*, 462 U.S. at 730-731).

Applying those principles, the court held that Congress must adopt the apportionment method that minimizes the "*absolute* difference between numbers of persons per representative" and the absolute variance from the nationwide average district size, rather than

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[2] As a threshold matter, the three-judge court held that it was properly convened under 28 U.S.C. 2284(a), and it rejected petitioners' contentions that the case presents a nonjusticiable political question and that respondents lack standing. J.S. App. 4a-5a. Judge O'Scannlain agreed with the majority on these threshold issues. *Id.* at 20a.

the "*relative* difference between the number of persons per repersentative and the relative difference between each person's share of a representative" (as the equal proportions method does). J.S. App. 13a-14a. Finding that the Dean method satisfies those standards, the court concluded that respondents had carried their initial burden of showing that a method other than equal proportions would "more closely meet" what it regarded as "the constitutional mandate of absolute population equality among districts." *Id.* at 15a.

The court next held that petitioners had not carried their resulting burden of affirmatively justifying the equal proportions method in these circumstances. J.S. App. 15a-18a. The court discounted Congress's judgment that relative difference is a better measure of equity than absolute difference because that judgment was made "without benefit" of *Wesberry*, and the court was unpersuaded by petitioners' contention that the equal proportions method is justified by mathematically demonstrable considerations of equity and fairness. *Id.* at 16a, 17a.

Finally, the court held that Congress had not made a "good faith effort" to achieve equal representation for equal numbers of people, "because the reapportionment process was automatic, and Congress, in its role as law and policy maker, had no part in the process." J.S. App. 18a. The court believed that "once every decade," Congress itself should "apply various accepted statistical methods to the census results and determine which method best meets the Constitutional mandate for population equality among the districts." *Id.* at 18a-19a.[3]

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[3] The respondent Members of Congress also alleged that 2 U.S.C. 2a is unconstitutional because its self-executing feature deprived them of the right to vote on an apportionment act

b. Circuit Judge O'Scannlain dissented from the majority's holding that 2 U.S.C. 2a is unconstitutional. J.S. App. 20a-34a; see J.S. 15-16.

REASONS FOR GRANTING THE PETITION

The district court has held unconstitutional the Act of Congress that establishes a permanent formula for apportioning Representatives among the States following each decennial census. We explain in the jurisdictional statement (J.S. 16-23) that this ruling is both unprecedented and clearly wrong, because the equal proportions method prescribed by 2 U.S.C. 2a unquestionably apportions Representatives among the States "according to their respective Numbers." Art. I, § 2, Cl. 3; Amend. XIV, § 2. There is no need to repeat that discussion here.

We have taken a direct appeal to this Court under 28 U.S.C. 1253 from the judgment of the three-judge district court. In our view, a three-judge district court was properly convened in this case, because respondents' suit is one "challenging the constitutionality of the apportionment of congressional districts" within the meaning of 28 U.S.C. 2284(a). Accordingly, a direct appeal lies to this Court under 28 U.S.C. 1253. See J.S. 25-28. It follows, under this position, that the Court of Appeals for the Ninth Circuit does not have jurisdiction of petitioners' pro-

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after the 1990 census. The court held that the congressional respondents have standing to press that claim, J.S. App. 5a, but did not resolve the claim on the merits because it held 2 U.S.C. 2a(a) unconstitutional for the distinct reasons discussed in the text. J.S. App. 18a n.9, 19a. Judge O'Scannlain agreed with the majority that the congressional respondents have standing to raise this claim, but he believed that it presents a nonjusticiable political question. *Id.* at 20a & n.1. See J.S. 14 n.14.

tective appeal from the judgment of the three-judge district court, because 28 U.S.C. 1291 excludes from the jurisdiction of the courts of appeals those cases in which "a direct review may be had in the Supreme Court." Because the court of appeals does not have appellate jurisdiction under 28 U.S.C. 1291, this Court likewise does not have certiorari jurisdiction under 28 U.S.C. 1254(1), because the case is not properly "in" the court of appeals. *United States* v. *Nixon*, 418 U.S. 683, 692 (1974).

However, if this Court should conclude, contrary to our position (and that of the district court and respondents), that the three-judge district court was improperly convened, an appeal from the judgment of the district court would lie in the court of appeals under 28 U.S.C. 1291, not in this Court under 28 U.S.C. 1253. *Board of Regents* v. *New Left Education Project*, 404 U.S. 541, 545 (1972); *Turner* v. *City of Memphis*, 369 U.S. 350, 353 (1962) (per curiam); *Wilentz* v. *Sovereign Camp, Woodmen of the World*, 306 U.S. 573, 582 (1939). It is for that reason that we have taken the protective appeal to the court of appeals, in addition to taking a direct appeal to this Court. And to ensure that this Court can render a decision this Term on the important constitutional questions presented even if it concludes that a direct appeal does not lie, we are filing this petition for a writ of certiorari before judgment to the Ninth Circuit, pursuant to 28 U.S.C. 1254(1). As a result, if this Court should decide at any point that it does not have jurisdiction over the direct appeal, it may grant this certiorari petition in order to render a decision on the merits. See *Turner*, 369 U.S. at 353-354 (granting a writ of certiorari before judgment after holding that a three-judge court was improperly convened); *Stainback* v. *Mo Hock Ke Lok*

Po, 336 U.S. 368, 371 (1949) (same); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 227-228 & n.78 (6th ed. 1985).

A petition for a writ of certiorari before judgment will be granted if a case is of "such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this Court." Sup. Ct. R. 11. This case plainly satisfies that standard. State legislatures are now in the midst of (or have already completed) the process of redrawing congressional districts in reliance on the apportionment of Representatives made pursuant to 2 U.S.C. 2a, and that apportionment also determines the number of Presidential electors to which the States will be entitled in the 1992 election. Art. II, § 1, Cl. 2; 3 U.S.C. 3. Although the district court's judgment does not actually order a different allocation of Representatives among the States for the next Congress, it declares the existing method unconstitutional and apparently contemplates that Congress will enact a new law to provide for a different apportionment. See J.S. 24 n.19. The Court should remove this cloud over the existing apportionment by setting aside the judgment below.

Furthermore, another challenge to 2 U.S.C. 2a has been brought by the Commonwealth of Massachusetts, which advocates use of another apportionment formula, known as the "Webster method." That method would result in a transfer of one Representative from Oklahoma to Massachusetts, while leaving the allocation to all other States (including Montana and Washington) unaffected. *Massachusetts* v. *Mosbacher*, Civ. No. 91-11234WD (D. Mass.). A three-judge court has been impaneled in that case as well. If the Massachusetts district court adopts the position of *either* party in that case, its ruling will con-

flict with the ruling of the three-judge court in this case. Prompt review therefore is especially warranted to avoid the possibility of inconsistent judgments regarding the constitutionality of the statutory formula for apportioning Representatives among *all* the States.

CONCLUSION

The Court should note probable jurisdiction of petitioners' direct appeal from the judgment of the three-judge district court under 28 U.S.C. 1253 and hold this certiorari petition pending disposition of that appeal. If the Court should conclude that it does not have jurisdiction over the direct appeal, it should grant this petition for a writ of certiorari before judgment and reverse the judgment of the district court.

Respectfully submitted.

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